BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUAN O. MARTINEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 145,421
MONFORT, INC.	)	
Respondent	)	
AND	)	
	)	
CITY INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent appealed the Award entered by Special Administrative Law Judge William F. Morrissey on January 13, 1997.

APPEARANCES

Claimant, now deceased, and his heirs at law having previously settled this claim with respondent on June 23, 1993, appeared not. The respondent and its insurance carrier appeared by their attorney, Terry J. Malone of Dodge City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Joel P. Hesse of Wichita, Kansas.

RECORD

The Appeals Board considered the record as listed in the Award.

STIPULATIONS

The Appeals Board adopted the stipulations listed in the Award. Additionally, the respondent and the Kansas Workers Compensation Fund filed a stipulation dated August 8, 1996, to the effect that claimant, Juan O. Martinez, had died on June 29, 1992, in a car accident unrelated to his employment with respondent.

ISSUES

The issue before the Appeals Board for review is what liability, if any, does the Kansas Workers Compensation Fund have in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

The facts of this case are generally not in dispute. Claimant received a low back injury while working for the respondent on April 3, 1990. The respondent provided extensive medical treatment through orthopedic surgeon, C. Reiff Brown, M.D., of Great Bend, Kansas. Dr. Brown first provided a regimen of conservative treatment for claimant's low back injury from May 14, 1990, through January 6, 1991. Finally, because claimant's symptoms did not improve, Dr. Brown performed a laminectomy and disc excision at the L4-5 vertebrae on January 7, 1991, for an acute disc herniation. Dr. Brown followed claimant until April 16, 1992, when the doctor opined claimant had met with maximum medical improvement. The claimant was released with a functional impairment rating of 30 percent of the whole body. Dr. Brown permanently restricted claimant to lifting occasionally 30 pounds; lifting frequently 15 pounds; avoid bending and being on his feet for prolonged periods of time. At the time of his release, claimant had returned to work for the respondent as a security guard for four hours per day.

Claimant had previously injured his low back in a work-related accident while he was employed by Hyplains Dressed Beef, Inc., (Hyplains) located in Dodge City, Kansas, on January 3, 1984. As a result of that low back injury, Guillermo Garcia, M.D., an orthopedic surgeon located in Dodge City, Kansas, performed a lumbar laminectomy and disc excision also at the L4-5 vertebrae. Dr. Garcia released claimant on August 29, 1984, opining claimant had a permanent partial impairment of 15 percent. Claimant was permanently restricted from performing heavy work. Dr. Garcia limited claimant to repetitively lifting of not more than 50 pounds and occasionally lifting not to exceed 70 pounds. The doctor also limited claimant's bending and stooping activities.

On December 6, 1985, claimant settled his claim for permanent partial disability compensation benefits for the January 3, 1984, injury at Hyplains before Special Administrative Law Judge John M. Russell, for a lump sum amount of $30,000. At the time of the settlement, claimant was not employed.

Following claimant's April 13, 1990, injury and release by Dr. Brown on April 16, 1992, the claimant met with an untimely death in a car accident on June 29, 1992, not related to his employment. Thereafter, the claimant's wife on her own behalf and on the behalf of claimant's eight surviving children, settled claimant's right to permanent partial disability benefits to the date of his death for a lump-sum amount of $5,800. The settlement hearing was held before Special Administrative Law Judge Linda L. Eckelman on June 23, 1993. All issues between the Fund and the respondent were reserved for future determination.

The Special Administrative Law Judge in his Award that is the subject of this appeal declined to assess any portion of the June 23, 1993, settlement award against the Fund. The Special Administrative Law Judge found the respondent failed to sustain its burden of proving that claimant knowingly made a misrepresentation on his employment application and pre-employment history and physical form at the time he applied for employment with the respondent's predecessor, Val Agri, Inc., on June 25, 1986.

In order for the respondent to shift liability to the Fund, the respondent has the burden to prove it had knowledge that claimant had a preexisting impairment that constituted a handicap and the respondent employed or retained the claimant after acquiring such knowledge. *See* K.S.A. 1989 Supp. 44-567(b). The Appeals Board finds Dr. Brown and Dr. Garcia established that following claimant's work-related injury of January 3, 1984, while he was employed by Hyplains, claimant had a permanent functional impairment of anywhere from 8 to 15 percent. Furthermore, although claimant had related a history to Dr. Brown that he was asymptomatic before his April 3, 1990, accident, the Appeals Board finds that due to the nature of claimant's injury and his established preexisting functional impairment, claimant was a handicapped worker when he applied for employment with respondent's predecessor on June 25, 1986.

Respondent does not argue that it had actual knowledge of claimant's preexisting low back injury and subsequent back surgery. The respondent claims the facts of this case prove that at time claimant applied for employment with respondent's predecessor the claimant knowingly misrepresented his physical condition. Therefore, knowledge of claimant's preexisting handicap is presumed conclusively as provided in K.S.A. 1989 Supp. 44-567(c) which states in pertinent part as follows:

> "Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents that such employee does not have such an impairment or handicap; . . . (5) misrepresents that such employee does not have any mental, emotional or physical impairment, disability, condition,

> disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation."

The claimant applied for employment with respondent's predecessor, Val Agri, Inc., on June 25, 1986. Claimant signed an application for employment which included a personal health history. Furthermore, claimant was given a pre-employment physical examination and was asked questions in reference to prior health conditions and injuries by the company nurse.

The record contains evidence that the claimant had a limited ability to communicate in English. There is a referral letter dated May 2, 1990, from Myron J. Zeller, M.D., of Garden City, Kansas, who treated claimant initially after his April 3, 1990, accident to Dr. Brown that indicates claimant speaks very little English. Dr. Brown referred claimant for a second opinion to Greg M. Snyder, M.D., an neurosurgeon in Wichita, Kansas. In a letter to Dr. Brown dated January 30, 1992, Dr. Snyder stated that claimant's wife served very satisfactorily as an interpreter. Dr. Snyder also mentioned in a letter dated February 27, 1992, to Dr. Brown that he had not discussed the examination results directly with claimant but did discuss the results through his wife because of the language barrier. Dr. Snyder admitted claimant to the hospital on February 25, 1992, for a myelogram/CT scan. In his discharge summary, Dr. Snyder noted that claimant's wife served as a good interpreter. Furthermore, claimant's wife served as the interpreter for claimant during the settlement hearing held on December 6, 1985, for claimant's first low back injury of January 3, 1984. However, there is no direct evidence in the record to establish how the claimant completed the employment application forms. Claimant's testimony was not taken before his death and a representative of the respondent did not testify.

The respondent argues it has met its burden of proving claimant knowingly misrepresented he did not have a preexisting back condition. Respondent points out claimant answered no to all the questions in regard to his previous back injury on his application for employment which included the following questions:

> "Have you ever had a back pain or injury to your back which prevented you from working a day or more?
>
> "Have you ever been awarded compensation from any state due to injury or by a branch of the armed services due to injury?
>
> "Have you ever had any major or minor operations?"

Also, the Val Agri, Inc., pre-employment history and physical form filled out by respondent's nurse on June 25, 1986, shows the claimant indicated that he had not had a previous back strain or a disability. Furthermore, claimant indicated that he had not had an illness or injury that required attention of a doctor in the last two years, was never hospitalized, had never filed a workers compensation claim, and had not undergone surgeries.

Conversely, the Fund contends the respondent failed to prove claimant knowingly misrepresented the fact he had suffered a previous back injury. The Fund asserts that claimant's limited ability to communicate in English, coupled with his limited sixth grade education led claimant to answer the questions in the negative. The Fund argues claimant's inability to understand English is supported by the employment application as he listed his age as 33 when his age was actually 34 having been born on October 24, 1951. The Fund takes the further position that claimant's answers were by accident or mistake due to his limited education and limited ability to understand English. The Fund cites the case of Collins v. Cherry Manor Convalescent Center, 7 Kan. App. 270, 640 P.2d 875 (1982) in support of its argument. The Court of Appeals in Collins held an employee cannot be said to be knowingly making a misrepresentation when he misrepresents the condition of his health to his employer solely by reason of accident or mistake.

The Appeals Board finds the facts in this instant case are distinguishable from the facts in the Collins. Before claimant was injured in Collins, she had suffered a number of minor back injuries due to incidents not related to her work. Claimant received conservative treatment for those injuries. There was no finding that the claimant suffered permanent functional impairment as a result of the injuries. The Cherry Manor's application for employment form only asked one relevant question in regard to claimant's previous back injuries and a space was provided for an answer to "Physical Disabilities" or "Chronic Illnesses". Claimant had worked for Cherry Manor on two separate occasions. On the first application claimant filled out, she wrote "none" in the space and when rehired a year later she left the space blank. The district court found claimant knowingly misrepresented her physical condition and assessed 90 percent of the liability for the award to the Fund. The Court of Appeals, however, remanded the case to the district court holding that "knowingly" refers to the claimant's state of mind. The Court of Appeals held that in ascertaining the employee's state of mind, it is appropriate to consider whether the question sufficiently called for revelation of the past problem, claimant's capacity to understand the question asked of her, her actual understanding, and her "bona fides" in answering.

In this case, although the claimant had a limited capacity to understand English and was limited in education, the claimant was able to accurately supply essentially all of the the information requested on both the application for employment and the pre-employment history and physical forms. Claimant supplied, among other things, information such as his name, social security number, birth date, previous address, previous employers, names of relatives, and names of friends that referred him for employment to respondent. Additionally, the questions the claimant answered in the negative in reference to his preexisting back injury were a number of very specific questions and not one general question as was asked the claimant in Collins. Also, the claimant here was off work as a result of his prior injury for a long period of time and that injury required surgical intervention. In Collins, the claimant was injured but was not off work for a long period of time and did not require surgical intervention.

The Appeals Board also finds it is significant that Dr. Garcia's medical notes indicate claimant was employed by Hyplains eight months before he was injured on January 3, 1984. Therefore, claimant commenced employment with Hyplains sometime in April 1983. When claimant filled out his application for employment with the respondent, he failed to list Hyplains as a previous employer. Claimant indicated he was employed from 1982 to 1985 for Payton Beef located in El Paso, Texas, which would encompass the period of time he was employed by Hyplains.

The Appeals Board concludes the greater weight of the evidence contained in the record supports the conclusion claimant knowingly misrepresented to the respondent he did not have a preexisting low back injury. The Appeals Board is mindful of the fact claimant had a limited ability to understand English and further was limited to a sixth grade education. Nevertheless, other than the information relating to his preexisting back injury, claimant was able to provide essentially all the information that was required on his employment application and also on his pre-employment history and physical form. Furthermore, claimant was able to furnish the respondent with a list of his previous employers but failed to list Hyplains as his most recent employer, who coincidently was his employer at the time he injured his back. All of which goes to establish knowing misrepresentation by claimant. Thus, the Appeals Board finds respondent has met its burden of proving knowledge of handicap by virtue of claimant's knowing misrepresentation of his preexisting condition. Therefore, the issue becomes whether the Fund should be responsible for all or a portion of the June 23, 1993, settlement award entered in this case. In that regard, Dr. Brown was the only physician who testified and issued an opinion on whether claimant's present injury was either contributed to or would not have occurred "but for" his preexisting back injury. It was Dr. Brown's opinion that claimant's current back injury would not have occurred "but for" his preexisting back condition. Accordingly, the Appeals Board concludes the Fund is responsible for 100 percent of the June 23, 1993, settlement award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey dated January 13, 1997, should be, and is hereby, reversed. The Kansas Workers Compensation Fund is ordered to pay all of the settlement award entered in this matter by Special Administrative Law Judge Linda Eckelman on June 23, 1993.

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry J. Malone, Dodge City, KS
Joel P. Hesse, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director